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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 696

ELTA KENWARD,

Petitioner,

vs.

THE "ADMIRAL PEOPLES," HER ENGINES, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF PETITIONER.

ANDREW G. HALEY,
JOHN P. HANNON,
WM. P. LORD,
Counsel for Petitioner.

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PORTLAND CALIFORNIA STEAMSHIP COMPANY.

PETITIONER'S BRIEF.

Statement of the Facts.

The petitioner herein, Elta Kenward, was a lady 73 years of age at the time the injury to her person complained of took place. Her libel against the steamship "Admiral Peoples" shows that she embarked thereon on a voyage from Wilmington, California, to Portland, Oregon. When the vessel arrived at Portland, the officers caused a gang plank leading from one of the decks to the wharf to be placed out, and it stood at a slope from the ship towards the wharf at an angle of 10° to 15°; that the gang plank was two feet in width and eighteen feet in length, and was

equipped with a rope railing which terminated approximately three feet from each end of the gang plank. It was further charged that the plank was so constructed that when it was put in place the shore end was about six inches above the level of the dock, which created a step from the gang plank to the dock, and as petitioner proceeded down the gang plank from the ship she was not advised of the step and no warning of any kind being furnished her, she was thrown forward from the gang plank and onto the dock and sustained certain disabling injuries. The particular negligence alleged is unseaworthiness of the gang plank and failure to equip the gang plank with a jumper at the shore end of the gang plank.

In the petition for writ of certiorari the petitioner cites authorities which are considered as a brief of the question involved. This brief is submitted supplemental thereto. The petition recites that only one of the several exceptions made was argued in the District Court, namely, that the cause is non-maritime. On appeal, the decree of the District Court (in sustaining the respondent's exceptions) was affirmed by the Circuit Court of Appeals. Judge Wilbur, who wrote the court's opinion, based its affirmance solely on the ground that admiralty was without jurisdiction to entertain the libel. The question of jurisdiction is, therefore, the only question before the Court.

ARGUMENT.

Admiralty has jurisdiction over torts occurring on a ship's gang plank when passing from ship to shore.

In the recent case of *The Brand*, 29 F. (2d) 792, the Court said:

> "In the admiralty, the jurisdictional test in cases of tort is the *locus* of the person or thing when injured. The question in this case to determine is whether the

libelant was on the land or on the water at the time of the injury.

"The 'gang plank' is a connecting link between the dock and the ship. It should be considered as an extension to the land in passage from the dock to the ship, and in passage from the ship to the dock as an extension to the ship. The status of the libelant as a dock workman had not changed at the time of his injury. This conclusion was supported by *The Atna* (D. C.), 297 F. 673. To the same effect is *Johnson* v. *United States Shipping Board Emergency Fleet Corporation* (C. C. A.), 24 F. (2d) 963."

The ruling principle applied in gang plank cases is set forth in the case of *Atna*, 297 Fed. 674, and in the case of *Egan* v. *Morse Dry Dock, etc.*, 212 N. Y. S. 56-58, 1926, A. M. C. 59-61, where reference was also made to the case of *The Strabo* (C. C. A.), 98 Fed. 998.

In the *Atna* case the Court stated:

"Cases such as the present are to be viewed not unlike other cases involving a change of status. The jurisdiction is not lost until the established relation or status is clearly lost or changed. When a person is injured in passing over a ladder connecting a vessel with the shore, the admiralty has jurisdiction if he is injured, that is, wronged, before he is entirely free from the ship and has safely reached the shore. If he is passing from the shore to the ship, the admiralty has not jurisdiction until he has reached the ship, and is entirely separated from the shore."

The fall of the petitioner from the ship's gang plank onto some obstruction should be regarded as an inseparable incident of the tort occurring on the ship's gang plank and caused by the negligence of the ship's officers and the negligent condition of the gang plank.

The only contact the petitioner had with the shore was when she hit the wharf after she stumbled from and was precipitated from the gang plank.

In the case of *The Strabo*, 98 Fed. 998, the facts show that the libelant was about to leave *The Strabo* by means of a ladder supplied by the vessel as a means of access and egress. While the ladder was resting upon the rail of the vessel, the libelant was, by reason of the falling of the ladder, and wholly because of the carelessness and negligent manner in which it had been left, thrown violently to the ground and injured. The Court reviewed the case of *The Plymouth*, stating that the language in that case, if taken literally,

> "declares that admiralty jurisdiction does not exist unless the substantial consummation of the injury or the substantial damage occurs on navigable water, and therefore if a passenger on board a steamship should, through the negligence of the owners, stumble on the ship upon a defective gang plank, and be precipitated upon the wharf, the injury would not be a maritime tort. *The language employed in The Plymouth decision, and which was applicable to the circumstances of that case, does not justify such a conclusion.* In this case it is highly probable that the libelant sustained some damage from the nervous shock while precipitated through the air, and before he fell upon the wharf. A person of sensitive nervous organization would, no doubt, receive such an injury. The injury commenced when, by the slipping of the ladder, the libelant was thrown through the air. Whether or not this throw was *damnum absque injuria* cannot be told, but it is true, as the district judge said, 'that the whole wrongful agency was put in motion and took effect on the ship, and thereby the libelant was hurled from his position on the ship, and before he reached the dock was subjected to the conditions inevitably resulting in physical injury, wherever he finally struck.' The cause of the action originated and the injury had commenced on the ship, the consummation somewhere being inevitable. It is not of vital importance to the admiralty jurisdiction whether the injury culminated on the stringpiece of the wharf or in the water."

If the petitioner had fallen in the river the cause of action would still be the same, as the juxtaposition of the wharf or the river to the gang plank was not the cause of the injury. Any one of an infinite variety of obstructions, maritime or otherwise, might have impeded her fall, the tort having occurred when she was thrown from the gang plank.

In *Smith and Son* v. *Taylor*, 276 United States, 179, relied upon by the appellee, this Court said:

> "The blow by the sling was what gave rise to the cause of action. It was given and took effect while deceased was upon the land. * * * The substance and consummation of the occurrence which gave rise to the cause of action took place on land."

That case must be distinguished from the case at bar in that there the injury took place on land, whereas in the case at bar the injury took place on an instrumentality of the vessel while the petitioner was debarking therefrom.

A series of cases cited on behalf of the appellee, in fact support the view maintained herein. A group of these clarified admiralty jurisdiction in connection with impinging state workmen's compensation laws, whereas others widely distinguished the rule laid down in *The Plymouth*, 18 L. Ed. 125.

Thus, in *Southern Pacific Company* v. *Jensen*, 61 L. Ed. 1086, the facts show that Jensen was an employee of the plaintiff in error. His work consisted in driving a truck onto the Steamship *El Oriente*, where it was loaded with cargo, then in driving the truck out of the vessel upon the gangway connecting the vessel with Pier 49, North River, and thence upon the pier, where the lumber was unloaded from the truck. The ship was about ten feet distant from the pier. The injury occurred in the following manner: Jensen started on the rear of the truck, the lumber coming

to his shoulders. While driving from the vessel onto the gangway the truck became jammed against the guide pieces on the gangway. Jensen reversed the direction of the truck and proceeded backwards into the hatchway. He failed to lower his head, which was thrown forward and in this manner his neck was broken. This Court held that admiralty had exclusive jurisdiction and that the state workmen's compensation laws did not apply.

(See also *Knickerbocker Ice Company* v. *Stewart*, 64 L. Ed. 835, in which this Court held that the work of unloading a vessel is a maritime employment.)

Mr. Justice Butler states in *Vancouver Steamship Company* v. *Rice*, 288 U. S. 455, 77 L. Ed. 885:

> "The foundation of the right to recover is a wrongful act or omission taking effect aboard the ship and resulting in death upon the land. This is a maritime tort, and upon it the respondent's claim rests that the admiralty court has jurisdiction."

In the *Smith* case *supra* no claim was made that the defendant in error's deceased husband was killed by the sling, the blow by the sling being the cause of the death which was later consummated in the water.

State Industrial Commission v. *Nordenholt Corporation*, 259 U. S. 263, 66 L. Ed. 933, 25 A. L. R. 1013, 1018, and *Swayne & Hoyt, Inc.*, v. *Barsh*, 226 Fed. 581 (C. C. A. 9) are not in point, as the proximate cause of the injury occurred on land. The facts set forth in *Netherlands Company* v. *Gallagher*, 282 Fed. 171, 176 (C. C. A. 2) show that the injury happened to the plaintiff while working on the pier. *Nogueira* v. *New York, New Haven & H. R. Co.*, 281 U. S. 128, 74 L. Ed. 754, support the theory maintained by the petitioner herein.

It is our view that in the case at bar the admiralty should take jurisdiction. We believe that upon a close scrutiny

of the facts herein, the adjudicated cases, and the principles involved, that the Court will find for the petitioner.

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